BRUNSWICK CORPORATION, Appellant, v. BRITISH SEAGULL LIMITED and OUTBOARD MARINE CORPORATION, Cross-Appellants.

BRUNSWICK CORP. v. BRITISH SEAGULL LTD.

94-1049,-1050

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

35 F.3d 1527; 1994 U.S. App. LEXIS 25150; 32 U.S.P.Q.2D (BNA) 1120

September 14, 1994, Decided

SUBSEQUENT HISTORY: Rehearing Denied and In Banc Suggestion Declined

October 24, 1994, Reported at: 1994 U.S. App. LEXIS 30952.

PRIOR HISTORY: Appealed from: U.S. Patent and Trademark Office Trademark Trial and Appeal Board. (Opposition No. 80,900 & 89,901).

COUNSEL: Timothy J. Haller, Niro, Scavone, Haller & Niro, of Chicago, Illinois, argued for appellant. With him on the brief were John C. Janka and Michael P. Mazza. Of counsel were Raymond P. Niro, Samuel L. Alberstadt and Raymond P. Niro, Jr.

Robert E. Clemency, Michael, Best & Friedrich, of Milwaukee, Wisconsin, argued for cross-appellants. With him on the brief was Lee J. Geronime.

JUDGES: Before MAYER, RADER, and SCHALL, Circuit Judge.

OPINION BY: RADER

OPINION: RADER, Circuit Judge.

The Mercury Marine division of Brunswick Corporation appeals the decision of the Patent and Trademark Office's Trademark Trial and Appeal Board (Board) sustaining Opposition Nos. 80,900 and 80,901. British Seagull Ltd. v. Brunswick Corp., 1993 TTAB LEXIS 21, 28

U.S.P.Q.2D (BNA) 1197 (TTAB 1993). The Board refused to register the color black as a mark for Mercury's outboard motors. Because the color black is de jure functional in this instance, this court affirms.

BACKGROUND

Mercury has manufactured and sold marine outboard engines for over thirty years. In 1962, Mercury introduced its first all black outboard engine. Since 1964, all Mercury outboard engines have been black. * In the last three decades, Mercury has spent over $ 100 million in advertising and generated $ 3 billion dollars in sales of its outboard motors. Some of Mercury's advertisements focused on Mercury's "all black" color. Mercury engines were not, however, the only black outboard engines on the market during that time. British Seagull Ltd., Sears, Roebuck & Co., and Outboard Marine Corp. also produced black engines or dark engines virtually indistinguishable from black.

- - -Footnotes- - - - - - - - - - - - - - -

* The Board noted that although Mercury seeks registration of its "all black" engine color, Mercury has never sold an all black engine devoid of any other colors or markings. Indeed, the engines have contained striping decals and the "MERCURY" trademark. However, the Board treated Mercury's proposed mark as the color black irrespective of lettering or decals also appearing on the engines. This court will do likewise.

- - -End Footnotes- - - - - - - - - - - - - -

On April 27, 1988, Mercury filed an application to register the color black for outboard engines on the Principal Register. Relying on 15 U.S.C. @ 1052(f) (Supp. V 1993), Mercury claimed that the color black, while not inherently distinctive, acquired secondary meaning and served as a trademark for Mercury's outboard engines. The Examining Attorney allowed the registration. British Seagull Ltd. and Outboard Marine Corp. (the opposers) filed Opposition Nos. 80,900 and 80,901. Upon motion

of the parties, the Board consolidated the oppositions.

The Board considered the proposed mark's functionality:

Although the color black is not functional in the sense that it makes these engines work better, or that it makes them easier or less expensive to manufacture, black is more desirable from the perspective of prospective purchasers because it is color compatible with a wider variety of boat colors and because objects colored black appear smaller than they do when they are painted other lighter or brighter colors. The evidence shows that people who buy outboard motors for boats like the colors of the motors to be harmonious with the colors of their vessels, and that they also find it desirable under some circumstances to reduce the perception of the size of the motors in proportion to the boats.

British Seagull, 28 U.S.P.Q.2D (BNA) at 1199. The Board concluded that the color black,

applied to the engines, is de jure functional because of competitive need.

The Board next ruled on evidentiary matters. The Board refused to consider materials which Mercury submitted to the Examining Attorney to show registrability under 15 U.S.C. @ 1052(f) because they were not part of the record in the inter partes opposition proceeding. The Board also denied the opposers' request to exclude some of Mercury's evidence: Harold Exhibit 5, DuCoty Exhibits 1 & 2, the Mantis survey, Mellenthien Exhibit 253, Piper Exhibits 2 through 6, and related testimony.

On the merits of distinctiveness, the Board held that Mercury did not show secondary meaning. Mercury presented, inter alia, a survey (the Mantis survey) in which 73% of the respondents associated black outboard engines with a single source. The Board found that this survey did not show that black was a source indicator for Mercury goods.

The Board also found that Mercury's use of black on outboard engines was not exclusive. Several of Mercury's competitors in the outboard market had engines colored black or dark colors easily perceived as black. Moreover, Mercury contributed to third party use of black on outboards by supplying an all black engine to an independent retailer for resale to the general public.

The Board concluded that Mercury's all black color for outboard engines was not registrable. Mercury appeals from the Board's decision holding that the color black applied to its engines is de jure functional and without secondary meaning. The opposers cross-appeal the Board's decision to admit Harold Exhibit 5, DuCoty Exhibits 1 & 2, the Mantis survey, Mellenthien Exhibit 253, and Piper Exhibits 2 through 6.

ANALYSIS

I. De jure Functionality

A.

A trademark is "any word, name, symbol, or device, or any combination thereof" used by a marketer "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. @ 1127 (1988). A trademark protects only features which are not functional. Textron, Inc. v. United States Int'l Trade Comm'n, 753 F.2d 1019, 1024, 224 U.S.P.Q. (BNA) 625, 628 (Fed. Cir. 1985). "In general terms, a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 850 n.10, 72 L. Ed. 2d 606, 102 S. Ct. 2182 (1982). Such functional features cannot receive trademark protection.

Like any other mark, the use of color -- if functional -- cannot serve as a trademark. In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1120-21, 227 U.S.P.Q. (BNA) 417, 419 (Fed. Cir.

1985). When "the color applied to goods serves a primarily utilitarian purpose it is not subject to protection as a trademark." Id. Functionality is a question of fact, In re Morton-Norwich Products, Inc., 671 F.2d 1332, 1340, 213 U.S.P.Q. (BNA) 9, 15 (CCPA 1982), and depends upon the totality of the evidence, Owens-Corning, 774 F.2d at 1120. A determination of functionality is reviewed for clear error. See Stock Pot Restaurant, Inc. v. Stockpot, Inc., 737 F.2d 1576, 1578, 222 U.S.P.Q. (BNA) 665, 666 (Fed. Cir. 1984). This court does not reweigh the evidence to decide anew whether the applicant's mark is functional. See id. at 1579. Rather, this court "accepts the [Board's] factual findings unless they are clearly wrong." Id.

B.

Functionality reflects a tension between two fundamental principles of trademark law. See Morton-Norwich, 671 F.2d at 1336-37. On the one hand, "there exits a fundamental right to

compete through imitation of a competitor's product, which right can only be temporarily denied by the patent or copyright laws." Id. at 1336. Because trademark protection is potentially perpetual in duration, protection of a functional trademark would defeat that fundamental right. On the other hand, the functionality doctrine also reflects the individual's right to protect symbols which identify the source of particular goods. Id. at 1337. In sum, the right to protect a product feature serving as a source indicator is limited by "the need to copy [articles which are not protected by patent or copyright], which is more properly termed the right to compete effectively." Morton-Norwich, 671 F.2d at 1339 (emphasis in original).

In balancing these two policies, this court acknowledges a distinction between de facto functional features, which may be entitled to trademark protection, and de jure functional features, which are not:

In essence, de facto functional means that the design of a product has a function, i.e., a bottle of any design holds fluid. De jure functionality, on the other hand, means that the product is in its particular shape because it works better in this shape. In re R.M. Smith, Inc., 734 F.2d 1482, 1484, 222 U.S.P.Q. (BNA) 1, 3 (Fed. Cir. 1984) (citations omitted) (quoting Morton-Norwich, 671 F.2d at 1338). Thus, merely labeling a design feature as functional will not necessarily defeat registrability. In re Teledyne Indus., Inc., 696 F.2d 968, 971, 217 U.S.P.Q. (BNA) 9, 11 (Fed. Cir. 1982). Rather, de jure functionality rests on "'utility,' which is determined in light of 'superiority of design,' and rests upon the foundation [of] . . . 'effective competition.'" Morton-Norwich, 671 F.2d at 1340.

Contrary to Mercury's assertion, the test for de jure functionality does not involve inquiry into whether a particular feature is "essential" to compete at all:

If the feature asserted to give a product distinctiveness is the best, or at least one, of a few superior designs for its de facto purpose, it follows that competition is hindered. Morton-Norwich does not rest on total elimination of competition in the goods.

In re Bose Corp., 772 F.2d 866, 872, 227 U.S.P.Q. (BNA) 1, 6 (Fed. Cir. 1985) (emphasis added).

In sum, the "crux" of the distinction between de facto and de jure functionality -- determining eligibility for trademark protection or not -- is a design's effect on competition. Morton-Norwich, 671 F.2d at 1341. Thus, the policies underlying the functional limitation on trademark protection explicitly invoke an inquiry into competitive fairness. Therefore, the Board did not err by basing its finding of de jure functionality on competitive need.

C.

Turning to the present case, the Board determined that "black, when applied to

[Mercury's] outboard marine engines, is de jure functional because of competitive need." British Seagull, 28 U.S.P.Q.2D (BNA) at 1199. The color black, as the Board noted, does not make the engines function better as engines. The paint on the external surface of an engine does not affect its mechanical purpose. Rather, the color black exhibits both color compatibility with a wide variety of boat colors and ability to make objects appear smaller. With these advantages for potential customers, the Board found a competitive need for engine manufacturers to use black on outboard engines. Based on this competitive need, the Board determined that the color was de jure functional. This court discerns no error in the Board's legal reasoning and no clear error in its factual findings.

This court's decision in Owens-Corning does not compel a different result. In Owens-Corning, Owens-Corning sought to register the color pink as applied to its fibrous glass insulation. This court reversed the Board's refusal to register

the color pink as Owens-Corning's trademark. The Board found that no other insulation manufacturer colored any of its products. The record revealed no reason to dye the insulation pink or any other color. Indeed, insulation in use is not open to general view at all. Owens-Corning alone undertook the additional, unnecessary step of coloring the insulation.

This court determined that no anti-competitive effects would follow from awarding Owens-Corning a mark for the color pink. Owens-Corning, 774 F.2d at 1123. Rather, the color served the "classical trademark function of indicating the origin of the goods," id. at 1123:

> We agree with the Board that the color "pink" has no utilitarian purpose, does not deprive competitors of any reasonable right or competitive need, and is not barred from registration on the basis of functionality.

Id. at 1122.

This case, as the Board found, compels a different result. All outboard engine manufacturers color their products. These manufacturers seek colors that easily coordinate with the wide variety of boat colors. The Board found that the color black served this non-trademark purpose. In addition, the Board found that the color black serves the non-trademark purpose of decreasing apparent object size. The record showed that these features were important to consumers. Unlike the pink color in Owens-Corning, the Board found a competitive need for the color black. Thus, the Board concluded that registration of Mercury's proposed mark would hinder competition. This court discerns no clear error in the Board's findings.

D.

In evaluating competitive need, the Board correctly stated:

When we consider whether a color is functional we must consider whether alternative colors are

available in order to avoid the fettering of competition. If competition will be hindered, the color in question is de jure functional. British Seagull, 28 U.S.P.Q.2D (BNA) at 1199. This approach harmonizes with Morton-Norwich:

> Since the effect upon competition "is really the crux of the matter," it is, of course, significant that there are other alternatives available.

Morton-Norwich, 671 F.2d at 1341 (citation omitted). Cf. Bose, 772 F.2d at 866 ("This case [in which the utilitarian nature of a five-sided housing for a five-sided mechanism has been established] is unlike Morton-Norwich where 'an infinite variety' of container shapes remained available to competitors.").

The Board also referred to the color depletion theory, which acknowledges "a limited number of colors in the palette, and that it is not wise policy to foster further limitation by

permitting trademark registrants to deplete the reservoir." Owens-Corning, 774 F.2d at 1120.

While disavowing in Owens-Corning the color depletion theory as a per se rule, this court nevertheless recognized its applicability in appropriate circumstances:

[The color depletion] theory is not faulted for appropriate application, but following passage of the Lanham Act courts have declined to perpetuate its per se prohibition which is in conflict with the liberating purposes of the Act.

Id. (first emphasis added). The functionality limitation on trademark protection properly subsumes any lingering policy concerns embodied in the "color depletion theory." The theory is not a per se bar to registration of color marks. Rather, traditional trademark policies, including the functionality limitation, set the boundaries for color mark registration. Thus, if the use of color on the applicant's goods serves a non-trademark purpose that hinders

competition, the de jure functionality doctrine precludes trademark protection. Only in that sense does the "color depletion theory" have any viability. Accordingly, the Board did not erroneously apply a color depletion theory to deny registration to Mercury's proposed mark.

E.

In In re DC Comics, Inc., 689 F.2d 1042, 215 U.S.P.Q. (BNA) 394 (CCPA 1982), the Court of Customs and Patent Appeals specifically rejected the notion that purely aesthetic features can in themselves confer utilitarian functionality on a proposed mark. At issue were drawings of Superman, Batman and Joker as trademarks for the applicant's toy dolls. The Board refused to register the proposed mark because, inter alia, the drawings were mere artistic renditions of the dolls and shared commercially functional features of "'customary dress, accoutrements, and facial expression'" with the dolls. Id. at 1043 (quoting Board opinion). This court's predecessor reversed:

[The Board] basically mislabeled as 'utilitarian' the ornamental features common to both the dolls and appellant's drawings, there being no engineering advantage conferred upon the dolls by the features involved here. We find no merit in the argument that, by virtue of the aesthetic features identified by the board, appellant's drawings are unable to perform as trademarks for toy dolls.

Id. at 1045. In DC Comics, the court thus held that the aesthetic aspects of the applicant's drawings did not preclude registrability. A concurring opinion explained:

It is arguable that there is no "doctrine" of aesthetic functionality which stands alone, without consideration of the more traditional source identification principles of trademark law. To the extent that there may be -- at least with respect to ex parte prosecution practice -- it has been previously rejected by this court.

Id. at 1050.

DC Comics stands for the proposition that aesthetic ingredients to commercial success are not necessarily de jure functional. Rather, traditional trademark principles govern the registrability of a proposed mark's aesthetic features. As with any mark, the test for de jure functionality hinges on whether registration of a feature hinders competition, and not whether the feature contributes to the product's commercial success.

In Owens-Corning, this court appeared to invoke the doctrine of aesthetic functionality: In Deere & Co. v. Farmhand, Inc., 560 F. Supp. 85, 217 U.S.P.Q. (BNA) 252 (S.D. Iowa 1982), aff'd, 721 F.2d 253 (8th Cir. 1983) [per curiam], the court refused to enforce the color "John Deere green" as a common law trademark for a front-end loader on the bases that the color green was "aesthetically functional" in that purchasers wanted their farm equipment to match, and that secondary meaning had not been established. Such conditions limit an

applicant's right to register a color for its goods, in order to prevent the appropriation of functional product features from the public domain. We thus consider whether the color "pink" [as applied to Owens-Corning insulation] may be so characterized.

Owens-Corning, 774 F.2d at 1121. A review of this commentary in context, however, shows that Owens-Corning did not revive the per se doctrine of aesthetic functionality rejected in DC Comics. Rather this court applied traditional trademark principles, including consideration of competitive factors, in assessing de jure functionality. See id. at 1122-23. Its reference to Deere & Co. merely reaffirmed this court's commitment to analyzing registrability in terms of effect on competition. See Deere & Co., 560 F. Supp. at 95, 98 (noting that the determinative question regarding functionality is "whether protection against imitation of the feature will hinder the competitor in competition," and finding that "protection of

John Deere green and the features that are common to both products would hinder Farmhand in competition").

In this case, the Board did not improperly deny registration to Mercury merely because black served purely aesthetic functions. Color compatibility and ability to decrease apparent motor size are not in this case mere aesthetic features. Rather these non-trademark functions supply a competitive advantage. The Board properly analyzed Mercury's use of black in terms of its non-trademark functions and its effect on competition. Indeed, the Board specifically distinguished its de jure functionality analysis from the doctrine of aesthetic functionality:

In the case at hand we are presented not with a design or configuration which is ornamental or simply more beautiful, but rather with a color which should be available for use by all manufacturers of these products because they need to use it to compete effectively.

British Seagull, 28 U.S.P.Q.2D (BNA) at 1199. In sum, the Board analyzed Mercury's use of the color black according to the law governing the functionality limitation on trademark protection. Additionally, the Board made no clearly erroneous factual findings. Therefore, this court affirms the Board's decision that Mercury's application of the color black to the exterior surface of its outboard engines is de jure functional.

II.

Mercury asserts that the Board erred by failing to consider its offer to limit its application to a specific, well-defined shade of black under 37 C.F.R. @ 2.133(b) (1993). This shade, "Mercury black," allegedly embraces "three dimensional quantitative lightness/chroma/ hue content specifications." Mercury's offer to amend consists, in toto, of the following passage found in its Response Brief, filed before the Board in response to the Opposers' Main Brief:

To the extent that the Board is concerned with the issues of color depletion or shade confusion, Mercury is willing to technically limit the range of its mark. This potential limitation can be considered by the Board under 37 C.F.R. @ 2.133(b).

The Board declined to rule explicitly on the offer to amend.

Section 2.133 provides:

(a) An application involved in a proceeding may not be amended in substance . . . except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board or except upon motion.

(b) If, in an inter partes proceeding, the Trademark Trial and Appeal Board finds that a party whose application or registration is the subject of the roceeding is not entitled to registration in the absence of a specified estriction to the involved application or registration, the Trademark Trial and Appeal Board will allow the party time in which to file

a request that the application or registration be amended to conform to the findings of the Trademark Trial and Appeal Board, failing which judgment will be entered against the party. 37 C.F.R. @ 2.133(a), (b). Mercury did not obtain the opposers' consent or Board approval, and did not file a motion to amend. Thus, section 2.133(a) does not compel the Board to address Mercury's offer. Under section 2.133(a), the Board did not err in evaluating the application as it was published for opposition. See Peopleware Sys., Inc. v. Peopleware, Inc., 226 U.S.P.Q. (BNA) 320, 321 n.2 (TTAB 1985). Section 2.133(b) also does not compel the Board to address Mercury's offer. Section 2.133(a) applies to amendments during the course of inter partes proceedings before the Board. Section 2.133(b), however, applies only to "restrictions" pertaining to the identification of goods and services in the application. Thus, section 2.133(b) does not apply where the applicant seeks to amend the

description of the mark. Furthermore, even assuming section 2.133(b) does apply here, Mercury has filed no motion or included any affirmative pleading in its answer. Therefore, the Board had no duty to address Mercury's offer to amend. See Personnel Data Sys., Inc. v. Parameter Driven Software, Inc., Cancellation No. 18,719, 1991 TTAB LEXIS 26, * 5 (TTAB Sept. 13, 1991).

III. Acquired Distinctiveness

Under 15 U.S.C. @ 1052(f), marks which have become distinctive of the applicant's goods in commerce may, in proper circumstances, receive trademark registration. However, "evidence of distinctiveness is of no avail to counter a de jure functionality rejection." R.M. Smith, 734 F.2d at 1484-85. See also New England Butt Co. v. United States Int'l Trade Comm'n, 756 F.2d 874, 877, 225 U.S.P.Q. (BNA) 260, 262 (Fed. Cir. 1985)("'One who seeks to register (or protect) a product or container configuration as a trademark must demonstrate that its design is

'nonfunctional' . . . and that the design functions as an indication of source, whether inherently so, because of its distinctive nature . . . or through acquisition of secondary meaning.'" (quoting Morton-Norwich, 671 F.2d at 1343)(alteration in original)). Because the Board correctly applied the functionality limitation to preclude registration, Mercury may not register the color black as applied to the exterior surface of its outboard engines. Therefore this court need not reach the issue of acquired distinctiveness.

IV. Admissibility of Evidence

The opposers cross-appeal, arguing that the Board erred by refusing to exclude certain evidence on grounds of hearsay and inadequate foundation. The Federal Rules of Evidence govern inter partes proceedings before the Board. 37 C.F.R. @ 2.122(a) (1993); Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 1575-76, 6 U.S.P.Q.2D (BNA) 1001, 1004 (Fed. Cir. 1988). Any alleged error in admitting evidence is not

reversible unless the opposers establish prejudice. See id. at 1582; Stock Pot, 737 F.2d at 1581. In light of its rulings on the merits, this court has "no reason to fault the Board's consideration of that evidence, especially since [the opposers have] not shown prejudice to [them] from that consideration." Stock Pot, 737 F.2d at 1581.

AFFIRMED

British Seagull Limited v. Brunswick Corporation
Outboard Marine Corporation v. Brunswick Corporation

Opposition No. 80,900 to application Serial No. 73/724,973, filed April 27, 1988
Opposition No. 80,901 to application Serial No. 73/724,973, filed April 27, 1988

Trademark Trial and Appeal Board
July 30, 1993; November 12, 1992, Hearing
Before Rooney, Cissel and Quinn, Members.

COUNSEL: Robert E. Clemency of Michael, Best & Friedrich for British Seagull Limited and Outboard Marine Corporation.

Timothy J. Haller of Niro, Scavone, Haller & Niro for Brunswick Corporation.

OPINION BY: CISSEL

OPINION: Opinion by Cissel, Member:

On April 27, 1988 Brunswick Corporation filed an application n1 to register the mark shown below on the Principal Register for "internal combustion engines for boats," claiming first use in November 1963.

n1 Serial No. 73/724,973.

[SEE ILLUSTRATION IN ORIGINAL]

By amendment applicant noted that "(t)he mark consists of the color black as applied to the entire surface of the goods" and claimed registrability under Section 2(f) of the Trademark Act based on an allegation of twenty-four years of substantially continuous and exclusive use of the color black on its goods. Applicant further stated with respect to the drawing that "the phantom outlining of the configuration of the goods forms no part of the mark(,) but is merely intended to show position." Also by amendment, applicant specified "outboard marine engines" as its goods. The essence of applicant's claim is that the color black, as applied to outboard engines

for boats, serves as applicant's trademark. Applicant submitted evidence which persuaded the Examining Attorney that the color had acquired distinctiveness and that black identified applicant as the source of marine outboard engines.

Following publication of the mark, two oppositions were filed. Opposition 80,900 was timely brought by British Seagull Limited, and Opposition No. 80,901 was timely filed by Outboard Marine Corporation (hereinafter "OMC"). The two proceedings were consolidated by stipulation of the parties prior to the trial because both plaintiffs take the same position, that black should not be registered as applicant's trademark for these products, and both opposers have produced outboard engines which are black.

As grounds for opposition, opposers assert that since before applicant's claimed first use of what it claims to be its trademark, opposers have manufactured, advertised and sold outboard

motors which are painted black or a dark color which is not visually distinguishable from black; that other makers of marine engines have also sold black outboard motors; that the color black alone cannot function to identify applicant's goods and distinguish them from the goods of others; that the color black cannot be exclusively appropriated by applicant or anyone else as a trademark for outboard motors; that manufacturers and distributors of such products have a competitive need to use black on these goods; that applicant made misrepresentations of material fact to the Patent and Trademark Office during the prosecution of this application; n2 and that applicant has not established and cannot establish that the color black has become distinctive of applicant's outboard motors.

n2 This pleaded ground was not supported with either further argument or any evidence, so the Board has not considered opposers to have continued to assert it.

The record in this proceeding is one of the largest ever submitted for consideration by the Board. The parties do not appear to dispute the basic description of the record as presented in opposers' brief (the testimony, exhibits and the evidence made of record by notices of reliance take six typed pages just to list, and include over three thousand pages of testimony, as well as over eighteen hundred exhibits). Objections to various materials abound, however. The objections will be discussed as the various evidential materials are mentioned in connection with the pleaded issues.

Notwithstanding the daunting size of the record and the extremely contentious adversarial conduct of counsel for the parties in this proceeding, the fundamental issues to be resolved by the Board are not great in number. Basically, we must determine whether the color black, as used by applicant on its goods, has met the standards for registration under the Lanham Act. Based on careful consideration of

the evidence before us, the established legal precedents on this subject, and the arguments presented by the parties, we find that black is de jure functional as applied to marine outboard engines, and that, notwithstanding some degree of recognition in the marketplace that applicant makes black engines, the color black and other colors not readily distinguishable from black have been used on these types of products made and sold by several other business entities, so that black has not become distinctive of applicant's goods and therefore is not registrable as a trademark for applicant's goods. The facts supporting our reasoning are not seriously disputed, and they are discussed below as they apply to each issue.

Opposers pleaded and argued that the color black cannot function as a source indicator for applicant's goods to distinguish them from others because other manufacturers of these kinds of products have used black and other dark colors and have a competitive need to color

their goods black. There is considerable evidence offered to support opposers' argument that although the color black is not functional in the sense that it makes these engines work better, or that it makes them easier or less expensive to manufacture, black is more desirable from the perspective of prospective purchasers because it is color compatible with a wider variety of boat colors and because objects colored black appear smaller than they do when they are painted other lighter or brighter colors. The evidence shows that people who buy outboard motors for boats like the colors of the motors to be harmonious with the colors of their vessels, and that they also find it desirable under some circumstances to reduce the perception of the size of the motors in proportion to the boats.

Opposers argue that there is therefore a competitive need for other manufacturers to produce these goods in the color black in order to meet consumer demand. Opposers are trying to

keep applicant from exclusive appropriation of a feature, a particular color, which has as its characteristic that it makes outboard engines more saleable in the marketplace for these goods because the appearance created by the color is more desirable from the perspective of prospective purchasers.

In In re Owens-Corning Fiberglass Corporation, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985), the Court extended trademark protection to a single color for a product, holding that a traditional rationale for precluding registration was inapplicable to the facts of that case. The theory held not to apply there was the color depletion theory, which is that because of the finite number of colors available, to allow manufacturers to monopolize certain colors would hinder competition. Although the Court found this theory inappropriate in that case based on those facts, it acknowledged that color depletion could be a factor to consider under appropriate

circumstances. See also: Kasco Corp. v. Southern Saw Service, Inc. USPQ 2d , (TTAB 1993). The Board noted subsequently in Edward Weck Inc. v. IM Inc., 17 USPQ2d 1142 (TTAB 1990), that when we consider whether a color is functional we must consider whether alternative colors are available in order to avoid the fettering of competition. If competition will be hindered, the color in question is de jure functional.

This de jure functionality must be distinguished from the disfavored concept of aesthetic functionality. See: In re DC Comics, Inc., 689 F.2d 1042, 215 USPQ 394 (CCPA 1982). In the case at hand we are presented not with a design or configuration which is ornamental or simply more beautiful, but rather with a color which should be available for use by all manufacturers of these products because they need to use it to compete effectively.

The demonstrated advantages that black provides to purchasers of these products, are

confirmed by the evidence that many different sources provide black engines or engines in dark colors which may be difficult to distinguish from black. We therefore hold that black, when applied to applicant's outboard marine engines, is de jure functional because of competitive need. If applicant were permitted to appropriate exclusively a particular color which makes these goods more marketable, competitors who could not color their products with similar colors would be at a competitive disadvantage. This is not a situation like the one in Owens-Corning, where no other maker of the product in question colored the goods. Here all other makers of outboard marine engines use one color or another. To limit their options by allowing applicant exclusive appropriation of one of the most marketable colors would be unfair.

Given our holding that black as applied to outboard marine engines is de jure functional because of the competitive need to use it or

other similar colors, applicant may not register black as its trademark. Moreover, even if registration of black were not barred for this reason, then because colors are not inherently distinctive, applicant would still have had to establish that black has acquired secondary meaning as an indicator of applicant as the source of these goods, and applicant has not proved that this is so.

The instant case is distinguishable from In re Deere & Co., 7 USPQ2d 1401, (TTAB 1988). In that case, the colors sought to be registered were conceded by the Examining Attorney to have acquired secondary meaning as indicating source in that applicnat, and there was no evidence that competitors had any need to use that applicant's color scheme in order to compete effectively.

The facts concerning applicant's use of the color black on outboard engines for boats are not seriously disputed. Applicant has produced Mercury outboard engines in only one color,

black, since 1964. n3 The record establishes that sales and promotion of applicant's black Mercury engines have been extensive. Over a hundred million dollars worth of advertising has assisted applicant in making sales of three billion dollars worth of black Mercury engines since 1964. Approximately one of every five outboard engines sold during the 1980's was a Mercury engine. The record clearly supports the conclusion that Mercury has been a major player in this field of commerce for a long time, and that Mercury engines have been sold only in the color black for almost thirty years.

n3 It is interesting to note that applicant's claim is that the entire surface of its engines is black. The testimony and evidence make it clear, however, that the "MERCURY" trademark and various striping decals are exceptions to this claim. Applicant has never sold an all black engine. Notwithstanding this admitted fact, however, opposers have not pleaded that registration is improper because applicant has

never used the mark it claims. We have therefore proceeded as if applicant's claim is that its trademark is the color black as applied to the surface of outboard engines except where stripes and the "MERCURY" trademark appear over the color black. The essence of applicant's contention is clear: that applicant is recognized as the source of black outboard engines irrespective of the word marks or decorative stripes which also appear on such products.

Applicant acknowledges that the color of a product per se is not inherently distinctive, and has accordingly sought to establish that black has acquired secondary meaning as applied to outboard marine engines as a result of extensive and substantially exclusive use and promotion by applicant. Applicant has attempted to show this secondary meaning in several different ways.

Before proceeding with the merits of the claim of distinctiveness, we must clarify a

number of questions regarding the evidence we have considered. To begin with, during the ex parte phase of the prosecution of this application, applicant submitted materials which persuaded the Examining Attorney that the color had acquired secondary meaning. Numerous exhibits, affidavits, and a market survey convinced the Examining Attorney to publish the mark for opposition. These materials, with the exception of those made of record otherwise in this inter partes proceeding (in connection with testimony or by proper notices of reliance), have not been considered by the Board. While the application file is automatically part of the record in an opposition proceeding by means of Trademark Rule 2.122(b), the allegations made, and documents and other things filed in connection with the application, are not evidence in the inter partes proceeding on behalf of the applicant. See: Kellogg Co. v. Pack'em Enterprises Inc., 14 USPQ2d 1545 (TTAB 1990), aff'd, 21 USPQ2d 1142 (Fed. Cir. 1991);

McDonald's Corp. v. McKinley, 13 USPQ2d 1895 (TTAB 1989). Accordingly, the materials submitted only in the ex parte effort to establish registrability under Section 2(f) of the Act were not considered in reaching our decision in this opposition proceeding.

The evidence submitted in this proceeding, as noted above, is voluminous, and most of it relates to whether or not the color sought to be registered has acquired secondary meaning. Opposers have objected to much of the testimony and other evidence which applicant asserts support its claim. The Mantis survey is a key element of applicant's case. To a lesser extent are the testimony and/or associated exhibits of Harold, Mellenthien, Piper, DuCoty, Rowe, Cook, Borst and Matuschka.

Opposers argue that the Mantis survey is flawed in any event, but the essence of opposers' objections to the large body of evidence concerning secondary meaning is that applicant's responses to various discovery

requests of opposers did not reveal applicant's intention to offer this evidence, but instead, mentioned only the application file. It is therefore asserted that these responses of applicant to discovery should have the effect of precluding applicant from introducing at trial any evidence which was not included with or referred to in the application file.

Opposers specifically refer to Interrogatories 31, 49, 50, 53 and 54. Copies of these inquiries and applicant's responses to them were made of record by opposers' March 4, 1992 notice of reliance. With the exception of Interrogatory 31, which related to likelihood of confusion, these interrogatories concerned the witnesses and evidence applicant intended to use at trial in order to attempt to establish that the color black has become distinctive of its goods. Applicant's responses to these interrogatories contained objections on the grounds that they were unduly broad, burdensome,

cumulative, attorney-client privileged, or were subject to work product immunity.

Ordinarily, when a party simply fails to respond to discovery requests, that party is subsequently barred from introducing evidence which was properly requested by its opponent. Weiner King, Inc. v. Wiener King Corp., 615 F.2d 512, 204 USPQ 820 (CCPA 1980). In the case at hand, however, applicant gave a partial answer and otherwise objected to opposers' requests. Applicant's answers and objections indicated that it would use a great deal of additional evidence, but that disclosure of all of it would be burdensome, etc.

A party is not required to disclose the entirety of its proposed evidence in support of its case during discovery. See: Charrette Corp. v. Bowater Communication Papers Inc., 13 USPQ2d 2040 (TTAB 1989); Polaroid Corp. v. Opto Specs, Ltd., 181 USPQ 542 (TTAB 1974); and American Optical Corp. v. Exomet, Inc., 181 USPQ 120 (TTAB 1974). Even if opposers' discovery

requests had been proper, in circumstances where discovery is unreasonably cumulative, duplicative, or unduly burdensome, it will be limited. See: Micro Motion Inc. v. Kane Steel Co. Inc., 894 F.2d 1318, 13 USPQ2d 1696 (Fed. Cir. 1990), and FRCP 26(b)(1).

Applicant could have simply declined to answer opposers' interrogatories on the ground that it was not required to specify in detail the evidence it intended to present at trial. Instead, applicant provided some answers and objected to other questions on the grounds that the interrogatories were cumulative, burdensome, etc. Responsive to applicant's objections, opposers could have moved to compel more complete responses, or might have modified the requests so as to avoid applicant's objections. In view of the underlying impropriety of the interrogatories, in the absence of such actions by opposers, and in light of the outstanding objections by applicant, opposers will not now be allowed to claim that they were unfairly

surprised that applicant has more evidence than that which was presented in the ex parte phase of the prosecution of this application. Opposers' objections to applicant's evidence of secondary meaning on the basis that such evidence was not produced responsive to discovery are therefore overruled. We have considered this evidence.

Additional objections to the testimony and/or exhibits of Harold, Mellenthien, Piper, DuCoty, Rowe, Cook, Borst, and Matuschka are made by opposers on a variety of grounds. Lack of foundation, failure to provide underlying documentation for either testimony or exhibits, improper assertion of privilege, and the aforementioned failure to make disclosures responsive to discovery requests were some of the bases for opposers' objections. Applicant argues, among other things, that opposers failed to pursue their objections promptly.

Apart from the arguments and the particular merits of each of these objections, even when we give these materials our full consideration and consider them to establish the facts which they are asserted to prove, all they do is shed some light on the reasons why some people know that applicant makes black outboard marine engines. As discussed in more detail below, recognition of this fact is not inconsistent with sustaining this opposition. Accordingly, the Board has considered the objected-to testimony and exhibits as if they were not improper.

Opposers additionally criticize the Mantis survey on a basis which is different from the procedural objection based on the discovery responses. Opposers contend that this study, which applicant commissioned during the course of this proceeding, does not establish that the color black has acquired secondary meaning as an indicium of the source of applicant's engines. The testimony of opposers' witness Robert Sorensen, a well-known survey expert, raises

questions as to whether the conclusions reached by Mr. Mantis are based on a survey which is "fatally flawed." Opposers assert that the survey responses were based on aided awareness.

The Mantis interviewers questioned owners of outboard engines or prospective owners of them outside boat shows. Interviewees were shown a photo of a Mercury outboard engine, but the photo had been touched up to remove the striping and the trademark "MERCURY," leaving the engine entirely black. Interviewees were asked whether they associated the color of the engine with one particular company or with more than one company. Those who responded that they associate the color with one particular company were then asked who they believed manufactured the engine.

Opposers contend that the photo used to stimulate responses provided additional information to those interviewed because of the size, shape, and configuration of the engine, and that these factors skewed the responses in

favor of applicant's position. Opposers argue that the interviewers should not have used a photograph at all, but rather should simply have asked whether the interviewee was familiar with outboard motors, and if so, what outboard motor manufacturer, if any, makes black ones. Opposers also challenge the Mantis survey based on the fact that Mr. Mantis did not personally attend or supervise the interviews, and that the interviews were conducted right outside boat shows wherein applicant's black engines may have been extensively displayed and promoted. The crux of all of opposers' arguments concerning the survey is that the interviewees may have had their awareness of applicant as the source of black engines aided or increased by the way the survey was conducted.

As applicant notes, citing T.J. McCarthy, Trademarks and Unfair Competition, (2d ed. 1984) @ 32.50 at 779, it is "notoriously easy" for one survey expert to tear apart the work of another. Even with this in mind, however, applicant

attaches great significance to the fact that opposers did not conduct their own survey in an attempt to avoid the alleged pitfalls of the Mantis survey.

Opposers clearly had no such obligation. The ultimate burden of establishing secondary meaning is always on an applicant. Yamaha International Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, (Fed. Cir. 1988). Moreover, even if the words proposed by Mr. Sorensen were to be used in another survey in an effort to satisfy opposers, opposers could still challenge that survey based on the contention that use of the word "black," instead of a graphic stimulus colored black, might skew the results in light of applicant's use of the word as part of its registered trademark "BLACK MAX" and as part of the name of a fictitious character named BLACK MAX who has been used in promoting and advertising applicant's products.

We recognize the practical difficulty in creating and conducting a survey on this issue

which could not be subject to at least some retrospective criticism, but even if we were to resolve the issue of whether the Mantis survey was based on aided awareness in favor of applicant, we would nonetheless have to conclude that the survey does not establish that black has acquired secondary meaning as an indication of applicant as the source for all black engines.

The problem we have with the survey is that while the survey does establish that a large portion of interviewees are aware that applicant makes black outboard marine engines, the survey does not provide convincing proof that these people believe that all black engines come from the same source. The interviewees in the survey were presumably not well versed in the legal significance trademark lawyers would attach to the phrase "associate with one particular source." We think it is likely that when these consumers responded affirmatively that they associated the color black with one particular

company, what they were communicating was that they could recall only one company that made black engines, rather than that they were able to name more than one such company. In fact, they may have known only one company which made outboard marine engines at all, irrespective of what color paint they bear. Even if the former were the case, i.e., that the question was interpreted as asking if they could identify a maker of black outboard engines, the affirmative responses at best would support the conclusion that a majority of those surveyed knew that applicant makes black engines. That interviewees could recall that applicant makes black engines is not surprising in light of applicant's sales and advertising, its market share, and the length of time that it has sold black engines.

Applicant has sold large numbers of its engines in a wide variety of sizes for almost thirty years in only one color: black. As noted above, applicant has spent over a hundred

million dollars advertising its engines, all of which have been black, and three billion dollars worth of these products have been sold. This extensive presence in the marketplace is bound to create recognition of the fact that applicant's engines are black. The evidence also shows that while applicant is not the exclusive purveyor of black outboard engines, applicant is responsible for the majority of them. That a large portion of the relevant purchasing public knows applicant makes black engines is understandable under these circumstances. Applicant would have us conclude that its large market share and extensive advertising showing black engines has created secondary meaning for the color as a source indicator, but the evidence of applicant's use and promotion of the color explains only why a large portion of those interviewed in the Mantis survey knew that applicant makes black engines. This evidence does not prove that these people believe that all black engines come from

applicant or from any single source. It proves only that responsive to the survey question, they could name applicant as a maker of black engines.

Moreover, applicant's evidence of the advertising of its goods does not convince us that black functions as a trademark for applicant's outboard engines. This evidence does include an excellent example of advertising specifically promoting black in connection with applicant's engines. The advertisement shown on the first three pages of applicant's brief is a textbook example of how to promote a color as a trademark. This copy was taken not from printed advertisements which were published in magazines or newspapers in general circulation or which were circulated to boaters in general, however, but rather was taken from applicant's 32-page 1986 catalogue, so its effect on the entire range of prospective purchasers of outboard engines is not as great as might otherwise have been the case. Although applicant claims that

distinctiveness is also established by the fact that it has consistently shown its black engines in all of its other advertising, such activity does little to support the distinctiveness claim for the color without language in the advertisements specifically touting the color as a source indicator. We note also that applicant has shown its goods in colors other than black in some of its advertisements.

In summary, based on applicant's relatively small amount of promotion of the color as a trademark, we cannot conclude that the advertising activities of applicant have created secondary meaning for black as applicant's trademark.

Several other factors also lead us to conclude that black as applied to the outside of marine outboard motors has not acquired secondary meaning indicating applicant as the source of all black engines. To begin with, the record establishes significant use on engines by others, of black and colors which are so close

to black that they are unlikely to be distinguished from black. Applicant itself is responsible for some of this, in that it manufactured black engines for sale by a retail merchant under the merchant's own trademark, and a subsidiary of applicant has sold black engines under the subsidiary's own mark. When the party which claims that matter has become distinctive of its goods is faced with use by others of the same or similar matter on the same goods, that party has a difficult burden to meet. Levi Strauss & Co. v. Genesco, Inc., 840 F.2d 1579, 222 USPQ 939 (Fed. Cir. 1984). When such a party has sold its own goods, bearing a color which it asserts has become distinctive of its goods, to third parties for resale to the consuming public as the products of those third parties, such practice detracts even further from the alleged distinctiveness of the color as that party's trademark. Edward Weck Inc. v. IM Inc., 17 USPQ2d 1142 (TTAB 1990).

The record shows not just that other black and near-black engines made by others have been on the market, but it also explains that possible reasons for this include the appearance benefits discussed above.

Turning back to the use by others of black and colors unlikely to be distinguished from black, we note that opposer Seagull has continuously advertised and sold primarily black outboard motors in the United States since 1960, which antedates applicant's use of the color black on its engines by several years. Applicant argues that Seagull's sales are de minimis and that Seagull's engines have been only mostly black, with some parts either left unpainted metal or painted, but not painted black. While the presence in the U.S. market of Seagull's engines has not been great and the engines in question are not entirely black, Seagull's sales here are not insignificant, and these engines must be considered to be primarily black, if not entirely black.

A much more significant use of the color black on outboard engines has been by Sears, Roebuck & Co., the nationwide retailer which has sold marine outboard engines through its department stores and also has sold them by means of mail-order catalogues. Like applicant, Sears has sold engines which are black over the entire outer surface except for the trim and the word used as a trademark. Sears has sold black outboard engines since 1982, and sales and advertising of them has been extensive. They are offered in a range of power outputs, from 1 1/2- to 15-horsepower, and compete directly with the lower-powered range of Mercury engines.

Of particular note is the fact that although Sears' name and the "GAMEFISHER" trademark appear on these engines, applicant is one of three different manufacturers (along with Eska and Tanaka) which have supplied "GAMEFISHER" outboard motors to Sears. Applicant's subsidiary, U.S. Marine Corp., which manufactures "FORCE" brand outboard motors,

provided black engines to Sears for sale under the trademark of Sears. In other words, applicant not only is not the exclusive user of black on such goods, it has actually itself contributed to the widespread use of the color, by a competitor, by producing black motors which are sold by Sears without any reference to applicant as the manufacturer of them. Such action by applicant is plainly contrary to applicant's claim of substantially exclusive use.

The record also establishes not only that opposer OMC has produced, promoted and sold black or dark colored engines, including "dark metallic charcoal" ones (the JOHNSON GTs), but also that OMC has produced for Tracker, one of the largest sellers of boat/motor/trailer packages, black engines which bear the marks "TRACKER/JOHNSON" and "TRACKER/EVINRUDE."

In summary, the record shows that during the same time that applicant has used only black on its engines, there has been extensive use of

black and closely-related dark colors n4 by others in the same market, and that some of these engines were actually produced by applicant for others to sell under their own marks. In the face of this third-party use, the claim of substantially exclusive use by applicant does not hold up. As the Court noted in Levi Strauss & Co. v. Genesco, Inc., supra., (at 940 and 941): "When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness upon which purchasers may rely is lacking under such circumstances." We reiterate that applicant has further diminished the alleged distinctiveness by itself manufacturing some of those black engines sold by others under their own trademarks.

n4 The parties elicited testimony and provided argument concerning differences and similarities among a range of dark colors from

"gunmetal grey," "charcoal," and "dark metallic charcoal," to dark blues and browns, etc. There is sufficient evidence of record for us to conclude that, putting semantics aside, there are a number of hues and shades which are not easily distinguishable, particularly from distances of greater than a few feet or in less than optimal lighting.

The extensive use by others of the feature sought to be registered not only diminishes the credibility of applicant's claim of distinctiveness, it gives credence to our interpretation of the Mantis survey. It would be unreasonable for such a large portion of prospective purchasers to attribute all black outboard engines to applicant in the face of the established use of black, and colors indistinguishable from black, by others.

Each party argues that its position in this proceeding is supported by In re Owens-Corning Fiberglass Corporation, supra. We agree that that case enunciates the principles upon which

the case at hand must be decided. In Owens-Corning the color pink was shown to have become distinctive of insulation made by the applicant based on the record of extensive and exclusive use and promotion of the color pink by the applicant. Significant factual differences in the case at hand lead us to a different conclusion here. As opposed to the instant situation, where all outboard engines are painted one color or another, and many have been sold by others in the same color sought to be registered by applicant, in the Owens-Corning case there was no need to color insulation at all, and no other maker of fiberglass insulation had used pink or any other color on its product. The Court specifically acknowledged that color performed no nontrademark function for insulation. Additionally, coloring insulation pink not only added an additional step and concomitant costs to the insulation manufacturing process, it did not result in a product which was more visually appealing or

more advantageous to the purchaser of it. Here the record establishes not only that engines colored black and related dark colors are more marketable, but also that such colors are widely used by others. In the Owens-Corning case, based on a record which established absolute exclusivity of use, with no use of any color whatsoever by any competitor, and with tremendous amounts of promotion directed specifically at associating the color of those goods with that applicant, the Court agreed that registration was appropriate, emphasizing that the case had been decided on its own particular factual record. In the case at hand, the facts established by the record are so different that application of the same legal reasoning results in the opposite conclusion.

Notwithstanding that consumer recognition of the fact that applicant makes black engines has been demonstrated, because of use by others of the same or closely related dark colors, some of which use was on products which applicant itself

made to be sold under the trademarks of others, registration to applicant would not be proper. Accordingly, even if the color black were not de jure functional because other manufacturers use, have used, and need to use black and other colors which are not readily distinguishable from black in order to compete effectively, applicant has failed to prove acquired distinctiveness for the color black in light of its widespread use on goods attributed to sources other than applicant. The oppositions are accordingly sustained and registration to applicant is refused.

United States Court of Appeals

for the Federal Circuit

94-1049,-1050

BRUNSWICK CORPORATION,

Apellant,

v.

BRITISH SEAGULL LIMITED

and OUTBOARD MARINE CORPORATION,

Cross-Appellants.

O R D E R

United States Court of Appeals

for the Federal Circuit

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 31, 1994.

FOR THE COURT,

FRANCIS X. GINDHART, CLERK

Dated: October 24, 1994

By Diane M. Frye \s\
Diane M. Frye
Chief Deputy Clerk

cc: TIMOTHY J. HALLER
ROBERT E. CLEMENCY

Filed
U.S. Court of Appeals
for the Federal Circuit
Oct 24, 1994
Francis X. Gindhart
Clerk

BRUNSWICK CORP V. BRITISH SEAGULL, 94-1049
(PTO - 80,900 & 80,901)

Note: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is a public record.

Patent and Trademark Office

Assistant Secretary and Commissioner

of Patents and Trademarks

Washington, D.C. 20231

(File Stamp)

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NOTICE OF PUBLICATION UNDER 12(a)

1. Serial No.:	2. Mark:
73/724,973	Miscellaneous Design
3. Applicant:	4. Publication Date:
Brunswick Corporation	Mar. 21, 1989

The mark of the application above identified appears to be entitled to registration. The mark will, in accordance with Section 12(a) of the Trademark Act of 1946, be published in the Official Gazette on the date indicated above for the purpose of opposition by any person who believes he will be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13 of the Statute

or by rules 2.101 and 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a certificate of registration.

Copies of the trademark portion of the Official Gazette containing the publication of the mark may be obtained at $9.50 each for domestic orders, or at $11.88 each for foreign orders from:

The Superintendent of Documents
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Washington, D.C. 20402

By direction of the Commissioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT** were served via First Class Mail, postage prepaid on this 14th day of December, 1994 on the below listed counsel:

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